No. 15-420

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
MICHAEL BRYANT, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF NATIONAL CONGRESS OF AMERICAN INDIANS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the National Congress of American Indians ("NCAI") is the oldest and largest organization representing Indian tribal governments, with a membership of more than 250 American Indian tribes and Alaska Native villages. NCAI was established in 1944 to protect the rights of Indian tribes and improve the welfare of American Indians. It frequently participates in matters before this Court that implicate the interests of Indians and Indian tribes. As relevant here, American Indians and Alaska Native women are battered, raped, and stalked at far greater rates than any other population of women in the United States. Since the establishment of the NCAI Task Force on Violence Against Women in 2003, enhancing the safety of Native women has been a critical focus of NCAI's work. NCAI submits this brief to explain why the Ninth Circuit's apparent distrust for tribal court convictions is ill-founded, and to emphasize the importance of deferring to Congress's judgment regarding the scope of the federal right to counsel in Indian country.

SUMMARY OF ARGUMENT

I. The Ninth Circuit's decision rests in part on an apparent distrust for tribal court convictions. In fact, there is every reason to treat such convictions as fair and reliable. To begin with, the Indian Civil Rights Act

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* and its counsel made a monetary contribution to its preparation or submission. The parties' letters of consent to the filing of this brief are being been filed herewith.

of 1968 (ICRA) extends a plethora of procedural protections to defendants in tribal court proceedings. ICRA guarantees criminal defendants the right to due process, the right to be free of unreasonable searches and seizures, the right to request a jury trial, the right to confront witnesses, the right against self-incrimination, and the right to counsel at the defendant's own expense—just to name a few. ICRA also provides a further backstop, in the form of a habeas corpus remedy that enables defendants to vindicate their ICRA rights in federal court. And in practice, tribal courts operate under procedures that parallel their state and federal counterparts in numerous ways. For instance, although procedures differ from one court to the next, tribal courts typically are guided by written codes of procedural and substantive law; allow for appellate review of convictions; and operate independent of the tribes' executive and legislative functions. Confirming the inherent reliability of tribal court proceedings, Congress and the states defer to tribal court outcomes—including criminal convictions—for numerous purposes. There is every reason, in short, to view tribal court convictions as fair and reliable regardless of whether the tribe provided appointed counsel to indigent defendants.

II. Even beyond its misplaced concern about the reliability of tribal court convictions, the Ninth Circuit's decision improperly sets aside Congress's determination regarding how best to protect tribal court defendants' rights while also protecting victims of domestic violence on Indian reservations. In discharging its trust obligation to tribes, Congress has broad power to regulate Indian affairs—particularly in the territory

known as "Indian country." Here, notwithstanding the fact that the Bill of Rights does not apply of its own force, Congress extended a wide array of procedural rights to criminal defendants in tribal courts. But Congress made a deliberate determination *not* to extend a blanket federal-law right to appointed counsel, and enacted Section 117—a tool to combat the serious problem of domestic violence in Indian country—against the background of that determination. The Ninth Circuit's decision improperly overrides this determination: it deprives federal prosecutors of an important law enforcement tool, simply because a tribal court has not provided a defendant with protections that the applicable federal law does not require in the first instance. That choice was for Congress to make, not the Ninth Circuit.

ARGUMENT

I. Tribal Court Decisions Are Fair and Reliable.

This Court has long treated Indian sovereigns as "distinct, independent political communities" whose methods of governance are worthy of fundamental respect. *Worcester v. Georgia*, 31 U.S. 515, 559 (1832); *see United States v. Wheeler*, 435 U.S. 313, 322-323 (1978). Tribal courts, in particular, play a "vital role in tribal self-government." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987). The Ninth Circuit's refusal to count Respondent's domestic assault convictions in the Northern Cheyenne Tribal Court as Section 117 predicate offenses rejects that understanding—and it does so "based on nothing more than a persistent distrust for tribal courts." Pet. App. 49a (O'Scannlain, J., dissent-

ing from denial of rehearing). That distrust is unwarranted.

The Ninth Circuit rested its holding on the notion that such convictions do not satisfy the "reliability concerns" that—according to the Ninth Circuit—"inhere in the Sixth Amendment right to counsel." Pet. App. 35a. Anything that "inheres in the Sixth Amendment" is beside the point here, for "the Bill of Rights does not constrain Indian tribes." *United States v. Shavanaux*, 647 F.3d 993, 997 (10th Cir. 2011); *see Talton v. Mayes*, 163 U.S. 376 (1896); *United States v. Cavanaugh*, 643 F.3d 592, 595 (8th Cir. 2011). But even if reliability concerns were relevant, the Ninth Circuit's distrust of tribal court procedures is misplaced.

In passing Section 117, Congress acted with the goal of "safeguarding the lives of Indian women." Violence Against Women and Dep't of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 901, 119 Stat. 2960, 3077-78 (2006). Congress did not act on a blank canvas; rather, Section 117 relies on tribal courts' robust procedures to ensure fairness and accuracy. Indeed, federal and state courts alike routinely rely on tribal convictions for a range of purposes. Congress's decision to ensure that recidivists like Respondent face enhanced sentences under Section 117, regardless of whether their tribal court convictions were counseled, should not give this Court pause.

A. ICRA Ensures that Tribal Court Decisions Are Fair and Reliable.

Although the Bill of Rights does not itself constrain tribal court prosecutions, tribal court defendants are

protected by the Indian Civil Rights Act. Passed in 1968, ICRA gives due regard to tribal sovereignty but also safeguards the rights of criminal defendants. *See* United States Commission on Civil Rights, *American Indian Civil Rights Handbook* 11 (Mar. 1972) ("In passing the Act, Congress attempted to guarantee individual rights to reservation Indians without severely disrupting traditional tribal culture."); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60-62 (1978) (noting that "a central purpose of the ICRA . . . was to secure for the American Indian the broad constitutional rights afforded to other Americans," while also highlighting Congress's intent to "promote the well-established federal policy of furthering Indian self-government" via *selective* incorporation of federal constitutional protections (internal quotation marks omitted)). In particular, ICRA gives tribal court defendants numerous rights that the Bill of Rights itself guarantees to defendants in state and federal court. Congress excluded the particular right to indigent defense counsel largely because of "the cost which the guarantee would impose on . . . already impoverished tribes." Donald J. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 Harv. J. on Legis. 557, 590-91 (1972). But Congress ensured that a full panoply of other rights—which may better cohere with tribal traditions, resources, and court structures—protect criminal defendants.

ICRA's host of protections ensures accurate, efficient, and procedurally fair adjudications in tribal courts. In particular, ICRA:

- Provides protection against unreasonable searches and seizures. 25 U.S.C. § 1302(a)(2). Tribal courts have elaborated this right in light of this Court's jurisprudence regarding the U.S. Constitution's Fourth Amendment. *See, e.g., E. Band of Cherokee Indians v. Reed*, 3 Cher. Rep. 126, 2004 WL 5807676, at *3 (E. Cherokee Ct. Aug. 26, 2004) (applying the "plain view" rule of *Coolidge v. New Hampshire*, 403 U.S. 443 (1971)); *Nevayaktewa v. Hopi Tribe*, 1 Am. Tribal Law 306 (Hopi Ct. App. 1998).

- Protects defendants against double jeopardy. 25 U.S.C. § 1302(a)(3). In addition to receiving application by tribal courts in its own right, this provision also finds analogs in many tribal codes. *See Navajo Nation v. Kelly*, 6 Am. Tribal Law 772, 779 (Navajo 2006) (applying the Navajo Nation Bill of Rights prohibition against double jeopardy); *Metcalf v. Coquille Indian Tribal Council*, 9 Am. Tribal Law 1, 12-14 (App'x A) (Coquille Indian Tribal Ct. 2009) (Title XX Mashantucket Pequot Civil Rights Code 1-3) (prohibiting double jeopardy).

- Provides defendants with a right against self-incrimination. 25 U.S.C. § 1302(a)(4). This provision has been interpreted by tribal courts in conversation with federal courts' interpretations of the U.S. Constitution's Fifth Amendment—including this Court's elaboration of the *Miranda* doctrine. *See Fort Peck Tribes v. Bighorn*, 1 Am. Tribal Law 121, 122-23 (Fort Peck Ct. App.

1997) (interpreting and applying *California v. Beheler*, 463 U.S. 1121 (1983)).

- Ensures defendants receive access to favorable witnesses and are able to confront unfavorable witnesses, that trials are speedy and public, and that defendants have the right to obtain counsel at their own expense. 25 U.S.C. § 1302(a)(6). This provision of ICRA mirrors the Sixth Amendment in every particular other than the considered absence of a right to indigent defense counsel. *Compare id. with* U.S. Const. amend. VI. Indian tribes themselves have further ratified their support for these principles of due process by adopting them in their tribal codes and constitutions. *See, e.g.*, Const. of the Chickasaw Nation art. XIII, § 2; Rev. Const. & Bylaws of the Minn. Chippewa Tribe art. XIII, § 1; Const. of the Kickapoo Traditional Tribe of Tex. art. X, § 2(h); N. Cheyenne Tribal Code § 1-1-6.

- Provides a right to a trial by jury upon request for offenses punishable by imprisonment. 25 U.S.C. § 1302(a)(10). Just as ICRA's § 1302(a)(6) varies slightly from the U.S. Constitution's Sixth Amendment, in that defendants possess a right to counsel only at their own expense, it also varies slightly, in that defendants possess a right to trial by jury only upon affirmative request. *See Eriacho v. Ramah Dist. Court*, 6 Am. Tribal Law 624, 628 (Navajo 2005).

- Provides a generalized right to due process. 25 U.S.C. § 1302(a)(8). As with ICRA's analogs to the Sixth Amendment, this due process right is

> similar, not identical to, its counterpart in the U.S. Constitution. Tribal, state, and federal courts have "long recognized" that this right is interpreted and applied with "due regard for the historical, governmental and cultural values of an Indian tribe." *Swan v. Confederated Tribes of Grand Ronde*, No. C-14-095, 2015 WL 5432377, at *8 (Grand Ronde Tribal Ct. Sept. 1, 2015) (internal quotation marks omitted) (citing federal cases).

The components of ICRA are not haphazard. As this Court has explained, Congress carefully calibrated ICRA to "fit the unique political, cultural, and economic needs of tribal governments." *Santa Clara Pueblo*, 436 U.S. at 62. The absence of a guarantee of indigent counsel was not an oversight by Congress. Instead, it was a recognition that tribes have their own methods of ensuring that defendants receive full and fair hearings and that, in light of the safeguards that ICRA *does* extend—including the right to due process—no further guarantees are necessary. Tribal court settings, moreover, often "stress[] reconciliation" as their "main purpose," Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part II of II)*, 46 Am. J. Comp. L. 509, 552 (1998). Indian tribes are tightly knit rural communities with strong kinship ties, where criminal incarceration often is a last resort. Indigent defense counsel simply is not the fulcrum upon which the reliability of tribal court decisions swings.

ICRA serves its role well, with tribal courts faithfully applying the statute to ensure that their determi-

nations are reliable and fair. Indeed, tribal courts typically interpret ICRA in accordance with federal court interpretations of concordant sections of the U.S. Constitution. *See* Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*, 84 U. Colo. L. Rev. 59, 75 (2013); *see also, e.g.*, *Bailey v. Grand Traverse Band Election Bd.*, No. 2008-1031-CV-CV, 2008 WL 6196206, at *12 (Grand Traverse Trib. Jud. Aug. 8, 2008) (looking to U.S. federal and Michigan state due process case law, and holding "that tribal members are entitled to . . . essentially the same due process protections under the GTB Constitution as they are afforded under the United States or State of Michigan Constitutions."). Even those tribal courts that explicitly avow their independence from U.S. federal court interpretation of due process nevertheless treat federal decisions as highly persuasive. As the Appellate Court of the Hopi Tribe has explained, "the Hopi Tribe is not *constrained* by the due process guarantees of the United States Constitution," but Hopi courts nevertheless have the discretion to—and, as a matter of practice, do—"review federal and state law" interpreting due process to inform their formulation of explicit, precise standards on given issues. *Norris v. Hopi Tribe*, 1 Am. Tribal Law 357, 362 (Hopi Tribal Ct. App. 1998) (emphasis added). Thus, tribal courts are in dialogue with the federal courts regarding how best to safeguard the rights of criminal defendants—just as Congress has designed.

Finally, as a further assurance that tribal jurisprudence engenders reliable and fair verdicts, ICRA provides tribal defendants with access to the writ of habeas corpus. Under 25 U.S.C. § 1303, "[t]he privilege of

the writ . . . shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." Thus, defendants who suffer significant constraints on their liberty may vindicate their ICRA rights in federal court. *See, e.g.*, *Shenandoah v. Halbritter*, 366 F.3d 89, 92 (2d Cir. 2004); *Jeffredo v. Macarro*, 599 F.3d 913, 919 (9th Cir. 2010). The presence of a habeas remedy reflects Congress's attentiveness to the "balance between the dual statutory objectives" of ensuring tribal sovereignty and protecting defendants' individual rights. *Santa Clara Pueblo*, 436 U.S. at 66. That remedy enables defendants to redress certain restraints on their liberty that have gone unchecked by tribal appellate processes. *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 319 (10th Cir. 1982). And the remedy is a robust one. It has been employed, for instance, to appeal banishment, *see Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 900-01 (2d Cir. 1996), involuntary hospital commitment, *see Necklace v. Tribal Court of Three Affiliated Tribes of Fort Berthold Reservation*, 554 F.2d 845, 845-46 (8th Cir. 1977), and imprisonment, *see Bustamante v. Valenzuela*, 715 F. Supp. 2d 960, 962 (D. Ariz. 2010). The availability of habeas corpus as a backstop underscores the appropriateness of treating tribal court convictions as fair and reliable.

B. In Practice, Tribal Courts Are Robust and Fair Fora for Criminal Defendants.

Consistent with the guarantees of ICRA, tribal courts in general—and the Northern Cheyenne Tribal Courts in particular—advance the values of due process

and the rule of law. Indeed, the checks on tribal courts often resemble the checks on federal and state courts.

For instance, tribal courts often operate according to the separation of powers. *See, e.g.*, Chickasaw Const. art. V, § 1 ("The powers of the government of the Chickasaw Nation shall be divided into three (3) distinct departments: 1. Legislative 2. Executive 3. Judicial. No person or collection of persons, being one of those departments, shall exercise any power properly attached to either of the others."); Choctaw Const. art. V, § 1 ("The powers of the government of the Choctaw Nation shall be divided into three (3) distinct departments: Executive, Legislative and Judicial. No person or collection of persons, being one of those departments, shall exercise any power properly attached to either of the others; provided, that the exercise of such powers shall be subject to any limitations imposed by this Constitution and Federal Law."); Muscogee Const. art. VII, § 1; Seminole Const. art. XVI.

Additionally, tribal court systems commonly provide for one or more levels of appellate review. The Seminole Nation of Oklahoma's Constitution, for instance, grants its Supreme Court appellate jurisdiction, along with the power "to issue, hear and determine writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition and such other remedial writs as may be provided by law." Seminole Nation of Okla. Const. art. XVI, § 2. The Chickasaw Supreme Court similarly possesses appellate jurisdiction that is "coextensive with the Chickasaw Nation and shall extend to all cases of law and in equity." Chickasaw Const. amend. V, § 4; *See also, e.g.*, Choctaw Const. art. XIII,

§ 1; Muscogee Const. art. VII, § 1; Puyallup Judicial Code § 4.16.250. Many tribes, moreover, are served by intertribal court associations, such as the Northwest Intertribal Court System[2] or Southwest Intertribal Court of Appeals.[3] These courts establish high standards for appellate jurisprudence throughout Indian country by employing leading members of the bar to provide independent review of tribal trial court decisions. *See* Frank Pommersheim, *Braid of Feathers: American Indian Law and Contemporary Tribal Life* 120 n.80 (1995) (describing the Northern Plains Intertribal Court of Appeals).

The robustness of tribal court protections should not be surprising, for tribes have no interest in error-prone courts. Indeed, tribal kinship sensibilities often ensure that courts aim to "repair the tear" to the social fabric caused by a criminal act, not to mete out draconian punishments for the sake of retribution. Cooter & Fikentscher, 46 Am. J. Comp. L. at 552. Respondent benefited from both this reparative ethos, and from the

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[2] The Northwest Intertribal Court System is a consortium of tribes in Washington State that pool resources to operate their court systems, including at the appellate level. *See Home*, Northwest Intertribal Court System, www.nics.ws (last visited Feb. 1, 2016); *Opinions*, Northwest Intertribal Court System, www.nics.ws/opinions/opinions.htm (last visited Feb. 1, 2016).

[3] The Southwest Intertribal Court of Appeals "provides an appellate court forum for tribes located in New Mexico, Arizona, southern Colorado, and west Texas." *Our Work*, American Indian Law Center, Inc., www.ailc-inc.org/SWITCA.htm (last visited Feb. 1, 2016).

due process rights that accompany it; they are more than enough to ensure that tribal court processes generate fair and reliable judgments for purposes of Section 117.

The procedures followed by the Northern Cheyenne Tribe—in whose courts Respondent was convicted—typify the protections that tribal courts commonly extend to defendants. In each of his domestic violence cases, Respondent entered a Northern Cheyenne court that was separated from the Tribe's legislative and executive functions. *See* N. Cheyenne Const. art. XI (Separation of Powers); N. Cheyenne Tribal Code tit. IA (Separation of Powers Code). The court exercising original jurisdiction was legislatively established. *See* N. Cheyenne Tribal Code § 1-2-1. Its judgments were subject to review by appellate courts and constitutional courts. *See* N. Cheyenne Tribal Code §§ 1A-4-1 to 1A-6-14. To ensure judicial independence and quality, moreover, Bryant's judges were subject to a plethora of requirements and protections: Judges in Northern Cheyenne courts are required to receive annual training, *id.* § 1A-15-1; are subject to the Northern Cheyenne Code of Judicial Conduct, *id.* § 1A-15-2; are insulated from any reduction in salary, *id.* § 1A-15-3; and must present a range of qualifications ensuring their suitability, *id.* §§ 1A-8-1 to 1A-8-13. Furthermore, the Northern Cheyenne have adopted the American Bar Association Code of Judicial Conduct into their legislative code. *See* N. Cheyenne Tribal Code tit. X.

Northern Cheyenne courts, moreover, adhere to robust and detailed codes of criminal procedure and evidence. *See* N. Cheyenne Tribal Code tits. V & VI.

Criminal defendants benefit from arrest strictures resembling those of *Miranda v. Arizona*. *See* N. Cheyenne R. Crim. Proc. C. 6. They also benefit from protections against unwarranted search and seizure. *See* N. Cheyenne R. Crim. Proc. C. 7 & 8. After arrest, they receive the protections of rules governing plea bargaining. *See* N. Cheyenne R. Crim. Proc. C. 11. Defendants like Respondent receive the opportunity to request a continuance in order to seek representation from a lay advocate or attorney trained in Northern Cheyenne procedures. And at trial, defendants benefit from a wide array of rights, including the right to know the nature and cause of one's charges, the right to confront witnesses, and the right to remain silent in lieu of self-incrimination. *See* N. Cheyenne R. Crim. Proc. C. 22. As a substantive matter, a defendant like Bryant would be prosecuted under a public legal code, *see* Northern Cheyenne Tribal Code § 7-5-10 (Domestic Abuse), and the judgment in his case would be rendered in accordance with written judicial opinions.[4]

C. Congress, State Court Systems, and This Court All Rely on Tribal Court Convictions.

In relying on uncounseled tribal court decisions as predicate offenses for Section 117, the Eighth and Tenth Circuits are in good company. Indeed, the range of courts and legislative bodies that have seen fit to credit tribal court convictions, both within and outside the domestic violence context, demonstrates how out of

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[4] While trial-level Northern Cheyenne decisions are not published, the judges keep written opinions on file for consultation in chambers.

step the Ninth Circuit is with the U.S. legal system's collective wisdom. If tribal court procedures are sufficient to render tribal court convictions reliable for this broad range of purposes, surely they are sufficient to support a prosecution under Section 117, even if uncounseled.

Numerous states give effect to tribal judicial decisions under application of the comity doctrine, which requires "deference and mutual respect" between sovereigns. *John v. Baker*, 982 P.2d 738, 762-63 (Alaska 1999) (internal quotation marks omitted). These courts—including those of Alaska, South Dakota, Montana, Oregon, and Wisconsin—view tribal court convictions as presumptively reliable. *See id.*; *Red Fox v. Hettich*, 494 N.W.2d 638, 641-42 (S.D. 1993) (quoting S.D. Codified Laws § 1-1-25); *Wippert v. Blackfeet Tribe of Blackfeet Indian Reservation*, 654 P.2d 512, 515 (Mont. 1982); *In re Marriage of Red Fox*, 542 P.2d 918, 921 (Or. Ct. App. 1975); *Sengstock v. San Carlos Apache Tribe*, 477 N.W.2d 310, 314 (Wis. App. 1991). Comity, of course, requires independent attention to the presence of due process. *See, e.g.*, *John*, 982 P.2d at 763. But as the Alaska Supreme Court has put it:

> [D]ue process analysis in no way requires tribes to use procedures identical to ours in their courts. The comity analysis is not an invitation for our courts to deny recognition to tribal judgments based on paternalistic notions of proper procedure. Instead, in deciding whether a party was denied due process, superior courts should strive to respect the cultural differences that influence tribal jurisprudence, as well as to

> recognize the practical limits experienced by smaller court systems.

Id. (footnotes omitted). Such cultural differences and practical limits inform the approach to indigent defense counsel adopted by the Northern Cheyenne and other tribes, and they do not undermine the vigorous protection of defendants' rights that tribal courts do provide.[5]

Over and above the comity provided by Alaska and other states, some states give full faith and credit to tribal court decisions. These states include Idaho, Iowa, Michigan, New Mexico, Oklahoma, and Washington. *See Sheppard v. Sheppard*, 655 P.2d 895, 902 (Idaho 1982); Iowa Code ch. 626D, subp. 5; Mich. Ct. R. 2.615; *Jim v. CIT Fin. Servs. Corp.*, 533 P.2d 751, 752 (N.M. 1975); Okla. Stat. tit. 12, ch. 2, app. R. 30; *Barrett v. Barrett*, 878 P.2d 1051, 1054 (Okla. 1994); Wash. Super. Ct. Civ. R. 82.5. The credence these states give to tribal court decisions undercuts the premise of the Ninth Circuit's decision. As the Michigan Court Rules explain, for instance, so long as tribal decisions come from tribes accepting reciprocal recognition and adhering to bedrock principles of due process, then

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[5] Indeed, failing to honor those differences and limits would have the effect of treating tribal court decisions with *less* respect than judgments of foreign countries. Federal courts regularly grant such judgments extraterritorial effect without running afoul of the Constitution, merely reviewing to ensure that the judgments are not void for reasons of public policy. *See, e.g.*, Sheldon R. Shapiro, *Valid Judgment of Court of Foreign Country as Entitled to Extraterritorial Effect in Federal District Court*, 13 A.L.R. Fed. 208, § 4 (collecting cases).

> [t]he judgments decrees, orders, warrants, subpoenas, records, and other judicial acts of a tribal court of a federally recognized Indian tribe are recognized, and have the same effect and are subject to the same procedures, defenses, and proceedings as judgments, decrees, orders, warrants, subpoenas, records, and other judicial acts of any court of record in this state.

Mich. Ct. R. 2.615(A).

States show respect for tribal court decisions in other ways, too. Numerous states use prior tribal court convictions—whether or not counseled—for collateral purposes akin to the charging enhancement of Section 117. At least ten states explicitly require sex offenders convicted in tribal court to register on sex offender registries. *See* Ark. Code Ann. §§ 12-12-903(14), 12-12-905; Ga. Code Ann. § 42-1-12; Idaho Code § 18-8303; Me. Stat. Ann. tit. 34-A, § 11203; Md. Code Ann., Crim. Procedure § 11-701; Mass. Gen. Laws Ann. ch. 6, § 178C; Mich. Comp. Laws Ann. § 28.722; Nev. Rev. Stat. 179D.210; Okla. Stat. Ann. tit. 57, § 582(B); Vt. Stat. Ann. tit. 13, § 5401.[6] Such a collateral consequence, while not criminal in nature itself, is "tremendously intrusive" and can "provide the basis for a criminal prosecution" if the offender does not register. *See* Kevin K. Washburn, *A Different Kind of Symmetry*, 34 N.M. L. Rev. 263, 273-74 (2004).

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[6] Other states' registry statutes do not specify how to treat tribal convictions. *See* Kevin K. Washburn, *A Different Kind of Symmetry*, 34 N.M. L. Rev. 263, 273 n.82 (2004).

Federal law and federal courts similarly rely on tribal court criminal convictions for a range of purposes. Under 18 U.S.C. § 2265(a), states are required to enforce tribal domestic violence protection orders—a regulatory collateral consequence of domestic violence prosecutions in Indian country. Even more significantly, federal courts have seen fit to rely on tribal court records when allowing the prosecution of juveniles as adults. *See In re T.W.*, 652 F. Supp. 1440, 1443 (E.D. Wis. 1987); *United States v. Means*, 575 F. Supp. 1068, 1070-71, 1073 (D.S.D. 1983). And the federal sex offender registration scheme is triggered by tribal court convictions. *See* 42 U.S.C. § 16911(6).

That other bodies commonly defer to tribal courts should come as no surprise, in light of the protections that tribal courts provide. To deem tribal court convictions unfair or unreliable in the absence of counsel requires one to ignore the multiple layers of procedural protections afforded tribal defendants. Congress recognized the robustness of this system when it passed Section 117, and this Court should follow the Eighth and Tenth Circuits in recognizing it as well.

II. This Court Should Respect Congress's Deliberate Determinations Regarding the Scope of the Federal Right to Counsel in Indian Country.

Separate and apart from its disregard for the inherent reliability of tribal court convictions, the Ninth Circuit's decision sets aside Congress's deliberate determinations regarding tribal court defendants' right to counsel. In the exercise of its broad authority to legislate concerning Indian tribes, Congress has carefully crafted a statutory scheme—the Indian Civil Rights

Act—that extends certain procedural protections to criminal defendants, but does not confer an across-the-board right to indigent counsel. Against that background, Congress enacted Section 117 without imposing any appointed-counsel requirement for a conviction to "count." This Court should respect Congress's considered choices.

Indian tribes retain inherent sovereign authority. *See, e.g., Wheeler*, 435 U.S. at 323 (explaining that Indian tribes "possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status"). As sovereigns, tribes possess the power to prosecute crimes by and against Indians within the limits of their jurisdiction. *See, e.g.*, Cohen's Handbook of Federal Indian Law § 9.04 (2012). In such prosecutions, tribes are not restrained by the Bill of Rights, for their "powers of local self government . . . existed prior to the [C]onstitution." *Talton*, 163 U.S. at 384; *see also Martinez*, 436 U.S. at 56 (noting that tribes are "separate sovereigns pre-existing the Constitution").

At the same time, however, Congress has sweeping power to enact legislation concerning tribes. As this Court put it in *Lara*: "[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that [the Supreme Court has] consistently described as plenary and exclusive." *United States v. Lara*, 541 U.S. 193, 200 (2004) (internal quotation marks omitted); *see Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been

deemed a political one, not subject to be controlled by the judicial department of the government."); *see also Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 359 (1962).[7]

Regulation of activities in Indian country is at the heart of Congress's power over Indian affairs. *See United States v. Celestine*, 215 U.S. 278, 284 (1909) (explaining that "to Congress, and to it alone, is given 'power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States,'" and that "[f]rom an early time in the history of the government, it has exercised this power, and has also been legislating concerning Indians occupying such territory" (quoting U.S. Const., art. IV, § 3, cl. 2). Thus, Congress has made "the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States" applicable to Indian country. 18 U.S.C. § 1152; *see id.* § 1151 (defining "Indian country"). Consistent with that approach, Section 117 applies to domestic violence assaults within "the special maritime and territorial jurisdiction of the United States or Indian country." *Id.* § 117(a).

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[7] *See also* Enabling Act of 1889, § 4, 25 Stat. 676, 677 (stating that "the people of [the proposed states of Montana, Washington, and North and South Dakota] do agree and declare that . . . said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States").

Taken together, tribes' sovereignty and Congress's broad authority mean that "unless and 'until Congress acts, the tribes retain' their historic sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (quoting *Wheeler*, 435 U.S. at 323). And courts, in turn, must defer to Congress's decision to act—or not to act. *See, e.g., id.* at 2039 ("Judicial deference to the paramount authority of Congress in matters concerning Indian policy remains a central and indispensable principle of the field of Indian law." (quotation marks omitted)); *Martinez*, 436 U.S. at 72 ("As we have repeatedly emphasized, Congress' authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained."); *cf. United States v. Antelope*, 430 U.S. 641, 644-46 (1977)

This principle requires the Court to defer to Congress's decision not to require appointed counsel in all tribal court criminal proceedings, and likewise requires the Court to refrain from imposing an appointed-counsel requirement as a condition for tribal court convictions to "count" under Section 117. *See United States v. Ant*, 882 F.2d 1389, 1398 (9th Cir. 1989) (O'Scannlain, J., dissenting) ("Because the nature of comity between tribal courts and federal courts . . . is so sensitive and so delicately balanced, it is up to Congress, not [a court], to change the rules if they should be changed at all."). In exercising its power, Congress has extended an appointed-counsel right to tribal court defendants in certain limited circumstances—but it has never done so across the board. Rather, Congress has—over a period of nearly five decades—repeatedly declined to require the appointment of counsel, as a

matter of federal law, in all tribal court criminal proceedings.

First, in enacting ICRA, Congress gave tribal court defendants a host of procedural guarantees but declined to provide a categorical right to appointed counsel. Instead, Congress gave defendants the right to counsel at their own expense. *See* 25 U.S.C. § 1302(a); *supra* pp. 6-8.

Second, in 2010, Congress revisited the right to counsel in tribal court proceedings. Again, however, it declined to categorically require appointment of counsel. Specifically, the Tribal Law and Order Act of 2010 amended ICRA to permit tribes to impose penalties of up to three years for a single offense. Pub. L. No. 111-211, tit. II, § 234(a), 124 Stat. 2258, 2279-80 (codified at 25 U.S.C. § 1302(a), (b)). Together with this authorization of increased penalties, Congress provided additional rights to criminal defendants: *If* a tribe imposes a term of imprisonment of more than one year, it must provide the defendant with certain added protections, including indigent counsel. 25 U.S.C. § 1302(c). That right to appointed counsel for indigent defendants applies only in these limited circumstances. If the defendant's punishment is less severe, Congress determined, appointed counsel is not required as a matter of federal law.

Third, just three years ago, Congress again addressed these issues, and again declined to give all tribal court criminal defendants the right to appointed counsel. The Violence Against Women Reauthorization Act (VAWA) of 2013 "recognized and affirmed" tribes' "inherent power" to exercise criminal jurisdiction over

all persons, including non-Indians, who commit domestic violence offenses against an American Indian or Alaska Native on tribal lands. Pub. L. No. 113-4, § 904, 127 Stat. 54, 120-23 (codified at 25 U.S.C. § 1304(b)(1)). VAWA of 2013 then created a "special domestic violence criminal jurisdiction" over certain non-Indians that a tribe could not otherwise exercise. 25 U.S.C. § 1304(a)(6). While thus providing tribal courts with more power, Congress granted defendants additional rights: To impose a term of imprisonment of any length under this "special domestic violence criminal jurisdiction," tribes must guarantee defendants the right to appointed counsel. 25 U.S.C. § 1304(d)(2); *see id.* § 1304(c). Again, however, Congress did not see fit to extend a federal appointed-counsel right to *all* tribal court criminal defendants—and in any event, whether to exercise jurisdiction under VAWA is completely optional for a tribe.

In repeatedly declining to extend a federal right to appointed counsel, Congress may have recognized—as Justice O'Connor has observed—that "the decision-making process[es used] by tribal courts need not, and sometimes do not, replicate the process undertaken in State and Federal courts." Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L.J. 1, 3 (1997). For instance, although many tribes provide indigent counsel with their own funds, others rely on trained lay counsel who are familiar with the tribal code and court procedures, and tribal judges often play a larger role in protecting the rights of the accused than is typical in Western justice systems. Regardless of its motives, however, it is clear that Congress considered the right to counsel, yet deliber-

ately decided *not* to require appointed counsel in all tribal court criminal proceedings.

Particularly against that backdrop, the Ninth Circuit's decision cannot be sustained. When Congress enacted Section 117 in 2006, it knew that federal law did not generally require tribes to provide appointed counsel. Nonetheless, Congress allowed tribal court convictions to be used as predicate offenses without imposing a separate appointed-counsel requirement. That deliberate congressional determination should not be set aside.

Leaving Congress's determination intact is particularly appropriate in these circumstances, moreover, because of the severity of the problem that it was confronting. American Indian and Alaska Native women experience domestic violence at startling rates. Sixty-one percent of American Indian and Alaska Native women have been assaulted. Patricia Tjaden & Nancy Thoennes, Nat'l Inst. of Justice, U.S. Dep't of Justice & Ctrs. for Disease Control and Prevention, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey* 22 (2000). American Indian and Alaska Native women are 2.5 times as likely to experience violent crimes as women of other races. Steven W. Perry, Bureau of Justice Statistics, U.S. Dep't of Justice, *A BJS Statistical Profile, 1992-2002: American Indians and Crime* 4-5 (2004). On some reservations, the murder rate of Native women is 10 times the national average. Ronet Bachman, et al, *Violence Against American Indian and Alaska Native Women*

and the Criminal Justice Response: What is Known at 5 (2008), https://www.ncjrs.gov/pdffiles1/nij/grants/223691.pdf. One-third of Native women will be raped in their lifetimes. Attorney General's Advisory Comm. on American Indian/Alaska Native Children Exposed to Violence, *Ending Violence So Children Can Thrive* 38 (2014). Presented with evidence of this problem, Congress decided to make tribal court convictions count as predicate offenses for purposes of Section 117 regardless of whether the defendant was provided with appointed counsel. The choice was Congress's to make and should not be disturbed.

None of this is to say, however, that tribes do not *want* indigent defendants to have counsel. Tribes want Congress to fully fund tribal justice systems, including indigent defense. And in certain respects, Congress has taken steps to facilitate provision of appointed counsel in tribal courts. For instance, although Legal Services Corporation grantees generally are prohibited from using federal funds to provide assistance in criminal proceedings, Congress has specifically exempted tribal court proceedings from that ban. *See* 42 U.S.C. § 2996f(b)(2). Tribes welcome that exemption, as a result of which indigent defendants often can obtain counsel even if federal law does not require as much.

Tribes also welcome the fact that the Indian Tribal Justice Act (ITJA), as amended, seeks to enhance tribal courts' capacity to provide indigent defense counsel. As relevant here, the ITJA now envisions that "base support funding" provided thereunder may be used for "the employment of tribal court personnel," including "public defenders" and "appointed defense counsel." 25

U.S.C. § 3613(b). Tribal criminal assistance grants, moreover, may be awarded to fund "defense counsel services to all defendants in tribal court criminal proceedings." *Id.* § 3663. Tribes nationwide have hailed these developments and urged Congress to appropriate the funds necessary to support indigent defense throughout Indian country, as one component of support for tribal justice systems. *See, e.g.*, Nat'l Congress of Am. Indians, Resolution #ABQ-10-116, at 2 (Nov. 2010), http://www.ncai.org/attachments/Resolution_NMmBVnhhVuXxcgFQKkRiZYqwKBRIMUwVSrETECusCxOWrTbZJiV_ABQ-10-116_rev.pdf; Nat'l Congress of Am. Indians, Resolution #SD-02-015, at 2 (Nov. 2002), http://www.ncai.org/attachments/Resolution_tXjABeaLwtfTCWRlzszAumIkNXzyVTiIkqluKdhKSvuFnFdkPOV_015.pdf. This Court should reject a rule that short-circuits this ongoing conversation between tribes and Congress and dilutes an important tool for protecting the victims of domestic violence in Indian country.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Ninth Circuit.

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